

# CHAPTER 7

## CONTRACT FORMATION

Solicitation of Offers	Bid Evaluation	Proposal Evaluation	Contract Award
24. Publicizing Proposed Contract Actions 25. Oral Solicitation 26. Solicitation Preparation 27. Preaward Inquiries 28. Prebid/Prequote/Preproposal Conferences 29. Amending/ Canceling Solicitations	30. Processing Bids 31. Bid Acceptance Periods 32. Late Offers 33. Price Analysis — Sealed Bidding 34. Responsiveness	35. Processing Proposals 36. Applying Past Performance, Technical, and Other Non-Price Factors 37. Price Analysis — Negotiations 38. Pricing Information From Offerors 39. Audits 40. Cost Analysis 41. Evaluating Other Offered Terms and Conditions 42. Award Without Discussions 43. Communications/ Factfinding 44. Extent of Discussions (Competitive Range) 45. Negotiation Strategy 46. Conducting Discussions/Negotiations	47. Debriefing 48. Responsibility 49. Subcontracting Requirements 50. Prepare Awards 51. Issue Awards & Notices 52. Mistakes In Offers 53. Protests

*Exhibit 7-1. Contract Formation Phase of the Federal Acquisition Process.*

### **Learning Objectives**

The learning objectives for this chapter are located at the front of the section or subsection to which they apply and are highlighted with gray shading. After completion of this chapter, you will be expected to know all the highlighted learning objectives for this chapter.

*Exhibit 7-2. Learning Objectives.*

## CHAPTER INTRODUCTION

In the Contract Formation Phase, the Government solicits offers and quotes, evaluates offers and quotes received, and awards contracts. The major functions of the this phase are shown in Exhibit 7-1.

A principal goal of this phase is to build the contract and obtain acceptance of the contract by both parties to the contract.

## 7.1 SOLICITATION OF OFFERS AND QUOTATIONS

Solicitation of Offers	Bid Evaluation	Proposal Evaluation	Contract Award
24. Publicizing Proposed Contract Actions 25. Oral Solicitation 26. Solicitation Preparation 27. Preaward Inquiries 28. Prebid/Prequote/Preproposal Conferences 29. Amending/ Canceling Solicitations			

*Exhibit 7-3. Steps in Soliciting Offers and Quotations*

To solicit offers or quotations, the CO:

- Publicizes the requirement.
- Conducts oral solicitations or prepares written solicitations.
- Answers inquiries about the solicitation.
- May conduct prebid/preproposal conferences.
- Determines whether to amend or cancel the solicitation.

### Unit 24 Publicizing Proposed Contract Actions

FAR Part 5	<ul style="list-style-type: none"> <li>• Describe CBD synopses.</li> <li>• Describe other methods of publicizing.</li> </ul>
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#### Purpose

COs generally publicize proposed contract actions prior to soliciting offers or quotations. The goal is to increase competition, broaden industry participation in meeting Government requirements, and assist small, small disadvantaged, and woman-owned small business concerns in obtaining contracts and subcontracts.

## CONTRACT FORMATION PHASE

Synopsizing	<p>The generally prescribed and most common way to publicize is the placement of a synopsis in the Commerce Business Daily (CBD). A synopsis is a brief description of the supplies and services to be acquired by contract. It also provides prospective offerors with information on obtaining a copy of the solicitation from the responsible contracting office. Generally, the requirement must appear in the CBD at least 15 days before the CO releases the solicitation to vendors. If using the combined CBD synopsis/solicitation, the solicitation is considered “issued” on the date of the CBD publication.</p> <p>The CBD is the public medium for announcing proposed contract actions, contract awards, and other procurement information. The CBD is issued every business day by the Department of Commerce. Each edition contains approximately 500 to 1,000 synopses and other notices. The Department also hosts an Internet-based, on-line, searchable version of the CBD, and COs can use the Internet to post their synopses to the CBD.</p>
Synopsis Requirement and Exceptions Thereto	<p>CBD synopses are required for contract actions expected to exceed \$25,000. However, the FAR ordinarily provides relief from the synopsis requirement when:</p> <ul style="list-style-type: none"><li>• The requirement is classified.</li><li>• Time does not permit the delays inherent in synopsizing.</li><li>• Ordering against a requirements contracts.</li><li>• Exercising an option.</li><li>• Using the Governmentwide Point of Entry (e.g., FACNET) to solicit quotations electronically on a nationwide scale.</li></ul> <p>Section 5.202 of the FAR also establishes other exceptions to the synopsis requirement. To determine whether an exception applies to a given contract action, see that section of the FAR.</p>
Other Methods of Publicizing Procurements	<p>COs further “publicize” the requirement by sending copies of the solicitation to potential offerors/quoters on their mailing lists (including e-mail). Where necessary to expand competition, COs may employ the methods in Exhibit 7-4.</p>
Response Times	<p>When contracting for non-commercial items at prices expected to exceed the simplified acquisition threshold (SAT), COs must allow offerors at least 30 days to prepare and submit offers from the day on which the IFB or RFP was issued. Thus, when a synopsis is required, COs allot at least 45 days for soliciting offers from the day on which the synopsis was published in the CBD.</p>

When contracting for commercial items or for any item expected to be under SAT, COs establish a solicitation response time which will afford potential offerors/quoters a reasonable opportunity to respond, considering such factors as complexity, commerciality, availability, and urgency. Another factor is use of the combined CBD synopsis/solicitation, given that the solicitation is considered “issued” on the date of the CBD publication, thereby saving 15 days.

### **OTHER METHODS OF PUBLICIZING**

Posting solicitation notices in public places (in required when the award price is expected to range between \$10,000 and \$25,000 or, in the case of Defense agencies, between \$5,000 and \$25,000). Electronic dissemination available to the public at the contracting office may be used to satisfy the public display requirement

Periodic handouts listing proposed contracts.

Announcements to local trade associations.

Announcements to newspapers and other media for publication without cost (paid advertising requires special authority and is seldom used).

Electronic bulletin boards.

Mailing of flyers to potential suppliers listed on the Bidder’s Mailing List.

*Exhibit 7-4. Other Methods of Publicizing Procurements.*

### **Unit 25 Oral Solicitations**

FAR 13.106-1(c)

- Describe the process for soliciting quotations orally.

In Unit 16, you made a decision about the method of soliciting quotations (when using the simplified acquisition procedures of FAR Part 13). If you elected to solicit quotations orally, now the question is how to conduct such solicitations.

## CONTRACT FORMATION PHASE

To solicit quotes orally:

- Call vendors. Identify yourself by agency/division. Confirm that the vendors will accept oral solicitations. If soliciting quotations under the total small business set aside, provide quoters with substantially the same information as conveyed by the clause at FAR 52.219-6.
- Describe the requirement in complete and unambiguous terms. Consistently describe the requirement from one call to the next. Do not disclose any information on other quotations. Identify any term or condition planned for the purchase order that would affect the development of a firm quotation.
- Request a quotation. In addition to asking for a unit or lot price, have the vendor specify a method of shipment/delivery (if applicable), an acceptable method of payment, any prompt payment discounts (should not be considered in quote evaluation), and the name of person providing the quote.
- Document the quotation.

### Unit 26 Solicitation Preparation

- Identify solicitation forms and media.
- Distinguish solicitations for commercial items from solicitations for non-commercial items.
- Identify the elements of the Uniform Contract Format.
- Discuss methods for issuing the solicitation.

#### Forms and Media

FAR 13.106-1(d),  
13.307, 14.201 &  
15.204

For most procurements, COs prepare printed (for distribution through the mails or fax machines) or electronic solicitations. When soliciting quotations under FAR Part 13, COs prepare Requests for Quotations (RFQs). When soliciting sealed bids under FAR Part 14, COs prepare Invitations for Bids (IFBs). When soliciting proposals under FAR Part 15, COs prepare Requests for Proposals (RFPs). Regardless of the method of procurement or purchasing, these three types of solicitations typically have the following basic parts in common:

- A Contract Schedule (i.e., the requirement).
- Contract Clauses.
- List of Documents and Attachments.
- Representations and Instructions (i.e., solicitation provisions).

Contracting officers can solicit offers and quotations electronically and permit contractors to submit their responses electronically. When preparing a solicitation authorizing electronic offers or quotations, COs specify the electronic commerce method(s) that vendors may use. COs also may consider the impact of electronic data interchange on the time reasonably needed by vendors to prepare and submit their responses— electronic commerce should accelerate this process.

## Solicitations for Commercial Items

### FAR Part 12

When acquiring commercial items, COs use either Standard Form (SF) 1449 (whether using the paper form or an on-screen replica of the form) or the combined CBD synopsis/solicitation (when the combined synopsis/solicitation does not exceed 12,000 textual characters).

FAR Part 12 requires only two provisions and two clauses for use with these two formats. Notwithstanding the provision and clause prescriptions in any other part of the FAR, NO other provisions and clauses are required for the SF 1449. The provisions and clauses are as follows.

- 52.212-1, Instructions to Offerors - Commercial.
- 52.212-3, Offeror Representations and Certifications - Commercial Items.
- 52.212-4, Contract Terms and Conditions - Commercial Items. This clause reflects standard commercial terms and includes language parallel to that in the Uniform Commercial Code on such matters as implied warranties.
- 52.212-5, Contract Terms and Conditions Required To Implement Statutes Or Executive Orders - Commercial Items.

In their FAR supplements, agencies may require use of other provisions and clauses only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the Senior Procurement Executive or representative on the FAR Council.

Based on market research, contracting officers may tailor the provision at 52.212-1 and the clause at 52.212-4 to incorporate customary terms and conditions of the commercial market for the requirement. Do this by writing an addendum (or addenda) to 52.212-1 or 52.212-4. In the addendum, you can either write language that modifies the provision or clause or (as is the preferred case) simply replaces the entire language of the provision or clause — combining the FAR language with the modifiers (so that the reader of the contract does not have to switch back and forth between the FAR provision or clause and the language of addenda to determine the meaning of the solicitation and contract).



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The FAR encourages tailoring especially if the commercial terms and conditions would be appropriate in concluding a business arrangement, satisfactory to both parties, and not otherwise precluded by law or executive order. However, contracting officers may NOT tailor terms and conditions of 52.212-4 that implement statutory requirements (e.g., assignments, disputes, payment, invoices, other compliances, and compliance with laws unique to Government contracts).

### FAR 12.301(d)

Contracting officers may, at their discretion, incorporate other provisions and clauses as addenda — provided the additional provisions and clauses are consistent with customary commercial practice. For example, contracting officers may include provisions or clauses related to the use of:

- Indefinite delivery contracts (FAR §16.505).
- Options (§17.208).
- Recovered materials (Part 23).

In considering any of these possible addenda, the essential question for the CO is whether or not any proposed addendum would further the Government's interests as a buyer. For instance, generally using the terms and conditions common to contracts with non-Federal buyers will result in a better price for the Government. But this is not always true; you must weigh the potential impact on price as one of the factors in deciding whether to stay with the language of 52.212-4 or modify it.

### Solicitations for Non-Commercial Items

When acquiring non-commercial items under FAR Part 14 or 15 procedures, COs generally follow the Uniform Contract Format (Exhibit 7-5) in assembling the solicitation document.

### FAR Part 52

Solicitations for non-commercial items ordinarily contain hundreds of provisions and clauses. For the most part, these are drawn from standard clauses and provisions in FAR Part 52, the agency's supplemental regulations, the activity's "clause book", and other such sources. Several FAR clauses and provisions must appear in all Federal solicitations (i.e., "boilerplate"). Others, generally classified as "required when applicable" or "optional", result from the CO's decisions on such matters as the:

- Method of procurement.
- Type of requirement (e.g., supply, service, construction, etc.).
- Type of contract to solicit.

To identify applicable FAR clauses and provisions, COs turn to the "Solicitation Provisions and Contract Clauses Matrix" in FAR section 52.3.

### Distributing the Solicitation

After preparing the solicitation, you next must make the solicitation available to interested parties. Among methods:

- Issue the solicitation to firms on the mailing list.
- Upon request, mailing to other interested sources (advising the requestor of any limits on competition).
- Providing copies on a “first-come first-served” basis for pickup at the contracting office to publishers, trade associations, and other such interested parties.
- Retaining a copy for review and duplication upon the request of an interested party.
- Distribute the solicitation electronically (You may limit availability of the solicitation to the applicable electronic medium when employing electronic commerce).

When restricting competition under FAR Part 6, you must provide copies of the RFP at their request to firms not solicited — but must also advise them of your determination to limit competition to selected firms.

UNIFORM CONTRACT FORMAT		
FAR 14.201 & 15.204-1		
<i>Section</i>	<i>Title</i>	<i>Examples or Purpose of Section</i>
<b>Part 1 - Schedule</b>		
A	Solicitation/Contract Form	The first page of the solicitation, (e.g., SF 33), with general instructions on when and where to submit offers and blocks for the offeror's name and address.
B	Supplies or Services and Prices/Costs	Lists the supplies or services being acquired by line item and quantity, with blocks for offerors to fill in prices.
C	Description/Specifications/Work Statement	Supplements the brief description in Section B to fully describe the supplies or services to be acquired.
D	Packaging and Marking	Specifies how the item must be packaged, packed, preserved, and/or marked, as appropriate.
E	Inspection and Acceptance	Specifies when, where, and how the deliverable will be inspected and accepted, as well as the contractor's obligations for quality assurance.
F	Deliveries or Performance	Specifies when, where, and how the item(s) must be delivered, or when and where the services must be rendered.
G	Contract Administration Data	Used for accounting and appropriation data and for additional contract administration information or instructions, such as the name and location of the Government activity that will (1) administer the contract and (2) make payments under the contract.
H	Special Contract Requirements	Used for requirements that occur on a contract-by-contract basis (e.g., special security requirements pertaining to classified materials).

*Exhibit 7-5. Uniform Contract Format*

<b>UNIFORM CONTRACT FORMAT</b>		
<i>Section</i>	<i>Title</i>	<i>Examples or Purpose of Section</i>
<b>Part II – Contract Clauses</b>		
I	Contract Clauses	Includes or references most clauses that will apply to work under the contract, including such matters as contract execution and interpretation, bonds, type of contract, set asides, subcontracting, foreign sourcing, labor management relations, environmental protection and occupational safety, patents and rights in data, payment, taxes, property, warranties, modifications, termination, and disputes.
<b>Part III – List of Attachments</b>		
J	List of Documents, Exhibits, or other attachments	The CO lists the title, date, and page count for any attachments.
<b>Part IV – Representations and Instructions</b>		
K	Representations, Certifications, and Other Statements of Offerors	Used for obtaining certifications (e.g., of Independent Price Determination, Nonsegregated Facilities, Buy American, Clean Air and Water, Drug-Free Workplace, etc.), representations, and other data from the offerors.
L	Instructions, Conditions, and Notices to Offerors	Used to instruct offerors on preparing and submitting the offers, including such matters as bid samples, descriptive literature, amendments, late submissions, failure to submit, and the like. Also used to notify offerors on such matters as preaward inquiries, award, and service of protests.
M	Evaluation for Award	Tells prospective offerors how offers will be evaluated (e.g., price-related and non-price evaluation factors).

*Exhibit 7-5. Uniform Contract Format*

## Unit 27 Preaward Inquiries

FAR 14.211

- Define preaward inquiry.
- Describe what may be disclosed.
- Explain how responses to preaward inquiries impact on the procurement process.

Definition	Preaward inquiries are questions and comments from prospective offerors about specifications, terms, and/or conditions in the solicitation.
What May Be Disclosed	General information not prejudicial to other offerors (i.e. not giving one offeror an unfair advantage over any other offeror) may be furnished upon request. For example: <ul style="list-style-type: none"> <li>• Explanation of the meaning of a clause.</li> <li>• Directions for locating a facility.</li> </ul>
Potential Impact	Refer all inquiries to the CO to avoid situations that might be viewed as improper disclosure. Technical or other information may be transmitted only by the CO or others having contractual authority. The improper release of information may result in a protest that could delay or void the entire procurement.

## Unit 28 Prebid/Prequote/Preproposal Conferences

- Define prebid/preproposal conference.
- Explain when one is necessary.

Definition	A prebid/prequote/preproposal conference is a meeting held before bid opening or before the closing date for submission of proposals or quotations. The CO or a designated representative conducts the conference.
When Necessary	Hold conferences for any or all of the following reasons: <ul style="list-style-type: none"> <li>• Provide for inspection of work site or Government furnished property.</li> <li>• Explain complicated specifications and requirements.</li> <li>• Explain revisions to requirements.</li> <li>• Address numerous offeror inquiries.</li> </ul>

Remarks or explanations made at a conference should not be construed as amending the written solicitation.

Conferences are not a substitute for amending defective or ambiguous specifications. Sometimes, however, conferences result in the issuance of a clarifying or correcting amendment to the solicitation.

### Unit 29 Amending/Canceling Solicitations

FAR 14.209,  
14.404-1, and  
15.206

- List examples of when amending a solicitation may be necessary.
- Describe how solicitations are amended.
- List examples of when it may be necessary to cancel a solicitation.
- Describe the cancellation process.

#### When to Amend

The CO shall amend a solicitation if it is necessary to:

- Change quantity requirements, specifications, delivery requirements, or the due date for offers.
- Correct or clarify an ambiguous or defective solicitation.

Amendments are not appropriate when the overall scope of the proposed contract action has changed to the extent that the original synopsis and/or solicitation no longer validly describes the requirement. In such cases, the solicitation should generally be cancelled.

If a solicitation is amended, the CO determines if the due date for submitting offers also needs to be changed and so indicates in the amendment. The CO may use electronic data interchange to notify prospective offerors of any change to the closing date for submitting proposals.

#### How to Amend

Generally prepare amendments on Standard Form 30. With respect to IFBs, send a copy of the amendment to all bidders who were provided a copy of the IFB. With respect to RFPs, send a copy of the amendment:

- If before the closing date, to all offerors provided a copy of the RFP.
- If after the closing date, to all responding offerors.
- If after the competitive range has been established, to all offerors in the range.

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**When to Cancel** Do not cancel solicitations unless it is clearly necessary, in the public's interest, and accomplished in accordance with agency regulations. However, you may cancel solicitations for such reasons as:

- The requirement no longer exists.
- Funds are no longer available.

A solicitation might be cancelled and resolicited if the overall scope of the proposed contract has changed to the extent that the original synopsis and/or solicitation no longer validly describes the requirement.

COs cancel RFPs and RFQs and resolicit whenever the Government's requirement has changed so substantially that it warrants a complete revision of the solicitation.

CO's may cancel IFBs after opening the bids for reasons such as the following:

1. All otherwise acceptable bids are at unreasonable prices.
2. Only one bid was received and the Government cannot determine the reasonableness of the price bid.
3. No responsive bid has been received from a responsible bidder.
4. Bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith.
5. Inadequate or ambiguous specifications were cited in the IFB.
6. Specifications have been revised.
7. The supplies or services are no longer required.
8. The IFB did not provide for consideration of all factors of cost to the Government, such as the cost of transporting Government furnished property to bidder's plants.
9. Bids indicate that the requirement can be satisfied by a different, less expensive deliverable than solicited.
10. A cost comparison as prescribed in OMB Circular A-76 shows that performance by the Government is more economical.
11. The requirements of FAR 10.008 on the availability and identification of specifications have not been met.
12. Cancellation is clearly in the public interest for other reasons.

### How to Cancel

When the CO decides to cancel an IFB before bid opening, follow the steps in Exhibit 7-6.

#### **CANCELING IFBs BEFORE OPENING**

- Return unopened bids.
- Send a cancellation notice to all prospective bidders, (i.e., those to which the solicitation was sent).
- Briefly explain in the cancellation notice why the solicitation was cancelled.
- Consider placing a cancellation notice in the CBD.
- Record cancellation.
- If electronic bids were authorized, do not let anyone view the electronic bids. Purge each bid and all related data received from the bidder from all data storage systems - both primary and backup.

#### *Exhibit 7-6. Canceling Solicitations.*

The steps in canceling after bid opening are roughly the same as in Exhibit 7-6, save that the bids have already been opened and that notice need be sent only to those firms that submitted bids. After canceling, the CO has three options:

- Obtain authority to negotiate with each responsible bidder (but only if the IFB was cancelled for one of the first four reasons above).
- Resolicit.
- Forego the requirement or meet it in-house.



## 7.2 BID EVALUATION

Solicitation of Offers	Bid Evaluation	Proposal Evaluation	Contract Award
	30. Processing Bids 31. Bid Acceptance Periods 32. Late Offers 33. Price Analysis — Sealed Bidding 34. Responsiveness		

*Exhibit 7-7. Steps in Evaluating Bids*

Evaluation is the next function in the Contract Formation Phase of the procurement process. After offers (bids or proposals) are solicited and received, they are evaluated.

Bids are evaluated differently than proposals. Hence, this section deals with bid evaluation. Section 7.3 presents the process for evaluating proposals.

### Unit 30 Processing Bids

FAR 14.4

Describe the procedures for:

- Receiving, securing, and controlling bids.
- Opening, and abstracting bids.

The essence of sealed bidding is that sealed bids are publicly opened and award is made to the lowest responsive, responsible bidder. To ensure integrity, the CO processes bids as described in Exhibit 7-8.

### PROCESSING BIDS

- ✓ Bids received are not opened until the time set for bid opening.
- ✓ Bids are secured in a locked box, to prevent tampering. Electronic bids are stored in a “secured restricted-access electronic bid box”.
- ✓ All bids received are accounted for.
- ✓ Bids are publicly opened and read by an authorized person at the time set for bid opening.
- ✓ Prices bid are properly recorded on an “Abstract of Bids.”
- ✓ Copies of bids are available for public viewing.

*Exhibit 7-8. Processing Bids*

### Unit 31 Bid Acceptance Periods

- Define the term bid acceptance period.
- Describe how it affects the award decision.
- Describe the process for considering bidder’s requests to modify or withdraw a bid.

#### Definition

A bidder is given the opportunity to specify a date on which his/her bid expires. The time before the bid expires is called the bid acceptance period. The solicitation may establish a minimum acceptance period. Bids offering less than the minimum time are nonresponsive.

#### Impact on Award Decision

FAR 404-1(d)

If the Government does not award the contract within the time specified for acceptance of the bid, the bid is no longer valid. If award has been delayed and the bid acceptance period of several of the lowest bids is about to expire, the CO can ask the lowest bidders whose bids have not expired to extend their bid acceptance period. The extensions must be in writing.

#### Bid Modification or Withdrawal

Bids may be modified or withdrawn by written or telegraphic notice not later than the exact time set for opening. The **“firm bid rule”** prevents a bidder from withdrawing his or her bid between bid opening and the expiration of the bid acceptance period. The IFB may allow bidders to modify

or withdraw bids by electronic massaging. If a bidder withdraws an electronic bid, purge the bid and all related data from all data storage systems - both primary and backup.

### Unit 32 Late Offers

FAR 14.304 and  
15.208

- Define “late”.

Bids received after the exact time set for opening of bids in the office designated in the IFB are late bids. (Proposals are considered late if received after the solicitation’s closing date). Ordinarily, you may not accept late offers are not accepted. However, the following are among the circumstances in which you may consider a late offer for award:

- The offer was sent by registered or certified mail to a contracting office in the U.S. or Canada no later than five calendar days before the specified bid receipt or proposal closing date. (If the offeror used *U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee*, the offer can be considered if sent not later than 5:00 PM at the place of mailing two working days prior to the specified bid receipt/proposal closing date.)
- The offer was sent by mail (or, if authorized in the solicitation, by telegram or via facsimile), and late receipt was due solely to mishandling by the Government after receipt at the Government installation.
- If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” offers.
- You may consider a late proposal in response to an RFP if it is the only proposal received.

These same circumstances also apply to modifying or withdrawing bids.

**Unit 33 Price Analysis — Sealed Bidding**

FAR 14.408-2

- Explain price-related factors and how they may affect the evaluation of a bid.
- Calculate bid prices to determine low, evaluated price for each item or group of items and compare with any “all or none” bids.
- Determine that lowest evaluated price is fair and reasonable.
- Identify your alternatives when prices appear unreasonable.

**Applying Price-Related Factors**

In sealed bidding, award is made to the low bidder who is also responsive and responsible. Identification of the low bidder is usually based on:

- The price bid.
- Application of the price-related factors.
- Possibility of making award to more than one bidder

In Chapter 6, Exhibit 6-17 lists commonly applied price related factors. To identify the lowest price bid, the CO now applies each factor to determine the *evaluated* price of the bid. Exhibit 7-9 illustrates the application of one such factor.

**APPLYING A PRICE RELATED FACTOR**

Assume the following bids for freezers:

<i>Bidder</i>	<i>Unit Purchase Price</i>	<i>Unit Energy Cost*</i>	<i>Evaluated Unit Price</i>
A	\$850	\$650	\$1,500
B	\$950	\$450	\$1,400

\*Net present value of expected energy costs over the five year specified system life of the freezer.

*Exhibit 7-9. Applying a Price-Related Factor*

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### Calculating the Lowest Price Bid

Contracts may be awarded to more than one bidder when a solicitation contains many “line” items. This can happen when the IFB instructs bidders to submit separate prices for:

- Each line item—for the entire quantity specified in that line item,
- Specified lots of the same line item ("incremental" buys—e.g., when bidders are instructed to submit one price for the first 100 units, a second price for the next 500 units, and a third price for the final 500 units), or
- Specified groupings of line items ("family" buys).

Bidders can qualify their bids (e.g., they can stipulate that they will accept award only for all the items). This kind of bid is called an “all or none” bid. If the "all or none" bid is the lowest for all line items taken as a whole vs. any other combination of bids, award can be made to that bid.

The CO determines which award or combination of awards will be most favorable to the Government. For example, the CO may accept Bidder A’s low bid for line item 1, Bidder B’s low bid for line item 2, etc. A number of mathematical calculations might be performed to identify the most favorable award combinations, as illustrated in Exhibit 7-10.

### IDENTIFYING THE LOW BIDDER

Assume the following bids:

<i>Bidder</i>	<i>Item 1</i>	<i>Item 2</i>	<i>Total Bid</i>
A	\$400,000	\$500,000	\$900,000
B	\$500,000	\$450,000	\$950,000

Bidder A’s bid is the lowest total bid at \$900,000. However, if you award Item 1 to Bidder A and Item 2 to Bidder B, the two awards combined would total only \$850,000. Even after factoring in the additional \$500 cost of administering two contracts instead of one, multiple awards would be the better bet.

*Exhibit 7-10. Identifying the Low Bidder*

## CHAPTER 7

### Fair and Reasonable Prices

#### FAR 14. 404-2(f)

A CO may not make an award at any price that he or she does not believe to be “fair and reasonable.” The determination of what constitutes a fair and reasonable price is affected by such considerations as:

- Prices bid in previous procurements for like items, as adjusted for inflation and other such variables.
- Current market prices, conditions, and trends.
- The extent of competition and whether the competitors prepared their bids independently of one another.
- Opportunities for quantity discounts revealed by the bidder's responses to the provision at FAR 52.207-4, Economic Purchase Quantity—Supplies.

As a very general rule, a price is fair and reasonable if it is what a “prudent” person is willing to pay when buying under similar circumstances. See Exhibit 7-14 for a further discussion of “fair and reasonable.”

### Alternatives When Prices Appear Unreasonable

If the low bid appears unreasonably **low**, the CO next determines whether there has been a mistake in bid (Unit 52). If the low bid appears to be unreasonably **high**, the CO next determines whether to cancel the IFB (see Unit 29).

## Unit 34 Responsiveness

#### FAR 14.404-2

- Define responsiveness as it relates to bids.
- List examples of minor informalities and irregularities in bids.

If a bid fails to conform to the essential requirements of the IFB, it is rejected as nonresponsive. Some examples include:

- Suppose that an IFB is for 1,000 widgets to be delivered no later than 15 January. Suppose further that the low bidder qualifies his or her bid to show delivery no later than 31 January. Because the delivery date is an essential requirement, the bid is rejected as nonresponsive.
- The bidder failed to use the electronic commerce method specifically stipulated or permitted by the IFB. The bid is nonresponsive.

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- The electronic bid is unreadable. The bidder fails to provide clear and convincing evidence both (1) of the content of the bid as originally submitted and (2) that the bid is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling. The bid is nonresponsive.

A bid that is nonresponsive at the time of bid opening cannot later be made responsive; this prevents a bidder from having “two bites at the apple.” However, if there is a discrepancy that is considered a minor informality or irregularity, the bid can still be considered for award. A minor informality or irregularity is one that is merely a matter of form and not of substance. It is an immaterial defect that can be corrected or waived without being prejudicial to the other bidders.

### **MINOR INFORMALITIES OR IRREGULARITIES**

Examples include failure of a bidder to:

- Return the number of copies of signed bids required by the IFB.
- Furnish required information concerning the number of its employees.
- Execute certain required certifications.

*Exhibit 7-11. Minor Informalities or Irregularities*

### 7.3 PROPOSAL EVALUATION

Solicitation of Offers	Bid Evaluation	Proposal Evaluation	Contract Award
		35. Processing Proposals 36. Applying Non-Price Factors 37. Price Analysis — Negotiations 38. Pricing Information From Offerors 39. Audits 40. Cost Analysis 41. Evaluating Other Offered Terms and Conditions 42. Award Without Discussions 43. Communications/ Factfinding 44. Extent of Discussions (Competitive Range) 45. Negotiation Strategy 46. Conducting Discussions/Negotiations	

*Exhibit 7-12. Steps in Evaluating Proposals*

This section addresses evaluating proposals, which is a part of the negotiation method of procurement.



## Unit 35 Processing Proposals

FAR 15.207 and  
15.208

Describe the following procedures for processing proposals:

- Receiving, securing, and controlling proposals.
- Opening and recording proposals.
- Processing late proposals.
- Comparing proposals with requirements of the RFP.
- Initiating proposal evaluation.

Receipt and  
Opening; Late  
Proposals

Proposals received before the closing date are secured, unopened, in a locked file. Electronic offers are stored in a “secured restricted-access electronic offer box”. As soon as possible after the due date, the CO privately opens (i.e., not a “public” opening) and records the proposals. There are special FAR procedures for resolving unreadable proposals and offeror requests to withdraw proposals. Late proposals are processed essentially the same as discussed under sealed bidding (Unit 32).

Initial Review

The CO compares the proposals and quotations with the requirements of the RFP or RFQ to ensure that required information, certifications, etc., have been provided. If a proposal departs in any respect from the terms and conditions of the solicitation, such variances must be identified and addressed in factfinding or discussions with the submitting firm. In some circumstances, the FAR even provides for rejection of a proposal if the offeror is unwilling to comply with provisions and clauses required for the acquisition (e.g., refusal to furnish the contingent fee representation prescribed in FAR 3.405).

Initiating Evalua-  
tion

Technical proposals are forwarded to the requiring activity or the technical evaluation team, as provided in the source selection plan. Price proposals are assigned for evaluation to specialists in the contracting office (and may also be furnished in part or in whole to technical evaluators for determining whether the technical approach and price are consistent and represent a reasonable amount of risk (i.e., for cost realism analyses). If field pricing support or audit is required, copies of the proposals will be furnished to the cognizant organizations. When distributing copies, remind all Government parties to safeguard the proposals or quotations, other proprietary information, and source selection information against unauthorized disclosure (to the public or anyone in Government not having a legitimate interest).

**Unit 36 Applying Non-Price Factors (Technical Evaluation)**

FAR 15.207 and  
15.208

- Identify the types of materials provided to technical evaluators for review.
- List the primary reasons for obtaining technical evaluations.
- Describe procedures for obtaining and evaluating past performance information.

What is Evaluated

During the technical evaluation of a proposal or quotation, evaluators must take into account the:

- Requirements documents and related aspects of the Schedule.
- The solicitation's stated evaluation factors (e.g., UCF Section M), along with any special standards of responsibility.
- Instructions for proposal preparation (e.g., UCF Section L).
- Oral presentations, when the solicitation provides for oral proposals as a supplement to written proposals.
- The written language of the quotations or proposals.

Reasons for  
Evaluating Pro-  
posals

Exhibit 7-13 lists the principal reasons for conducting technical evaluations. Note that several of these reasons apply even when conducting sole source negotiations either before or after award.

**REASONS FOR TECHNICAL EVALUATIONS**

- Determine whether the proposals or quotations are technically acceptable, based in part on “go/no-go” evaluation factors (if any).
- When the solicitation provides for trade-off analysis, rank proposals on the basis of non-price evaluation factors, such as past performance, and justify the rankings.
- Review the proposed labor mix, hours of direct labor, material mix and quantities, and the like, to support the CO's analysis of proposed costs (see Unit 40).
- Determine the need and prepare for communications/factfinding prior to discussions.
- Establish the competitive range (or select quoters, if any, for negotiations of quotations).
- Identify and support technical negotiation objectives.
- Provide constructive information to offerors regarding their technical proposals for debriefings

*Exhibit 7-13. Reasons for the Technical Evaluation.*

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**Past Performance** To evaluate past performance, COs start with the information on past performance provided by the offeror/quoter. Contracting officers also may obtain information on the past performance of a firm from sources other than that firm. This includes any source (public or private sector) known to the Government. In particular, obtain information from Government contracting activities that have evaluated an offeror's performance as prescribed in FAR Part 42.15.

When evaluating past performance information, consider such issues as:

- The number and severity of an offeror's problems,
- Effectiveness of corrective actions taken by the offeror,
- The offeror's overall work record.
- Age and relevance of past performance information.

### Unit 37 Price Analysis — Negotiations

FAR 15.404-1

- Define the terms "price objective" and "fair and reasonable" price.
- Identify the basic types of price comparisons.
- State the issues considered when analyzing price proposals to determine (a) a fair and reasonable price and (b) the Government's price prenegotiation objectives.

**Price Objectives** Before beginning negotiations with an offeror or quoter, establish a price objective, i.e., the "going-in" or prenegotiation position on price. In developing such objectives, the primary goal is to negotiate a "fair and reasonable" price (see Exhibit 7-14). In developing the objectives, apply any price-related factors as described in Unit 33.

### WHAT IS A “FAIR AND REASONABLE” PRICE?

In pricing a contract, the CO’s most important objective is to balance the contract type, cost, and profit or fee negotiated to achieve a total result and price **fair and reasonable** to both the buyer (i.e., the Government) and the seller (i.e., the contractor).

“Fair to the buyer” means a price that is in line with (or below) either of the following.

- The fair market value of the contract deliverable. “Fair market value” is the price that you **should** expect to pay, given the prices of bona fide sales between informed buyers and informed sellers under like market conditions in competitive markets for deliverables of like type, quality, and quantity.
- The (1) total allowable cost of providing the contract deliverable that would have been incurred by a **well managed, responsible firm using reasonably efficient and economical methods** of performance + (2) a reasonable profit.

Can a firm fixed price be considered “fair” even if the seller’s actual costs exceed the price? Yes, if the high costs result from slipshod management, obsolete tooling, and other such causes. The question is how the firm fixed price compares to what the work ought to have cost.

“Fair” to the seller means a price that is realistic in terms of the seller’s ability to satisfy the terms and conditions of the contract. Why should the CO care if a low offer is realistic? Because an unrealistic price puts both parties at risk. The risk to the Government is that the seller — to cut its losses — might:

- Cut corners on product quality.
- Deliver late.
- Default, forcing a time-consuming reprocurement.
- Refuse to deal with the Government in the future.
- Be forced out of business entirely.

#### *Exhibit 7-14. What is a “Fair and Reasonable” Price?*

##### Types of Price Comparisons

To establish the Government’s position on what constitutes a fair and reasonable price for the procurement, compare proposed prices to such indicators of reasonableness as:

- Prices offered and paid in past procurements for the same or a similar deliverable(s), with adjustments for such factors as inflation.
- Prices offered and currently being paid in other procurements.

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- Rough “yardsticks” (such as dollars per pound).
- Published price lists, published market prices, and price indices.
- Independent Government estimates of cost and value.
- Prices for the same or similar items obtained through market research

### Cost Analysis

If you do not have sufficient data to evaluate the overall proposed price, you may need to analyze the individual elements of cost that comprise the proposed price. This may entail:

- Obtaining information on elements of cost from the offeror or quoter (see Unit 38).
- Auditing the cost information (see Unit 39).
- Developing a prenegotiation position on each significant proposed element of cost (see Unit 40).

## Unit 38 Pricing Information From Offerors

### FAR Subpart 15.4

- Distinguish “cost and pricing data” from other types of pricing information that may be obtained from offerors or quoters.
- List conditions under which the firm must submit cost or pricing data and certify the data.
- Identify the circumstances that determine if an offeror is exempt from submitting cost and pricing data.

### Specifying Pricing Information to be Furnished by Offerors or Quoters

On occasion, you may need pricing information from the offeror or quoter to determine whether the proposed or quoted price is fair and reasonable and establish prenegotiation price objectives. To obtain such information, the contracting officer must specify:

- Whether **certified** cost or pricing data must be provided (i.e., “all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly”), OR
- What information must be provided if certified data are not necessary (i.e., “information other than cost or pricing data”, such as sales or cost information).

Requiring Cost or Pricing Data

When required under FAR 15.403-4 (see Exhibit 7-15), firms must submit complete data and "certify" that the data were **accurate**, **current**, and **complete** as of the date on which the Government and the firm concluded price negotiations and reached agreement on the price (or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price) . For this purpose, the firm must sign and submit a "Certificate of Current Cost or Pricing Data". If the firm's certification later proves false, the Government might be entitled to a price reduction (see Unit 78) for the defective data.

COs only request certified cost or pricing data as a last resort in cost and price analysis. The FAR prohibits obtaining cost or pricing data if an exception applies, and encourages a waiver in the event that an exception does not apply — if price reasonableness can be determined without resorting to certified data.

**EXCEPTIONS TO REQUIREMENTS FOR COST AND PRICING DATA**

*Required When*

A negotiated contract action exceeds \$500,000 (however, the CO may require such data at a lower dollar level, but not lower than the Simplified Acquisition Threshold).

A modification to a sealed bid or negotiated contract involves a price adjustment expected to exceed \$500,000.

*Unless*

- Prices agreed upon are based on adequate price competition.
- Prices agreed upon are based on prices set by law or regulation.
- A commercial item is being acquired.
- A waiver has been granted.
- Modifying a contract or subcontract for commercial items.

*Exhibit 7-15. Exceptions to Requirements for Cost or Pricing Data*

Requiring Pricing Information Other Than Cost or Pricing Data

If cost or pricing data are not required because an exception applies, or an action is at or below the cost or pricing data threshold, COs are required to analyze prices to determine price reasonableness and cost realism. Only to the extent necessary to make such determinations, COs may require offerors/quoters to submit information to support their price proposals (including information on such elements of cost as direct labor hours, wage rates, and direct material costs). For instance, such information may be neces-

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sary for sole source negotiations under the dollar threshold for certification.

### Unit 39 Audits

- Define an audit.
- State reasons why an audit may be necessary.
- State the general procedures taken when an audit is necessary.

#### Definition

FAR 15.404-2

To audit means to review a company's accounting procedures, accounting practices, books, records, documents, and other evidence related to (a) cost or pricing data or (b) costs claimed to have been incurred or anticipated to be incurred in performing a contract. Audit reports include findings on such matters as:

- The firm's basis and method for estimating costs.
- The accuracy, completeness, and currency of submitted cost or pricing data.
- Additional cost or pricing data of relevance to the proposal.
- The dollar impact of technical analyses received by the auditor.
- The adequacy of the offeror's estimating methods and accounting systems.

FAR 15.405(a)

An auditor's recommendations and counsel are advisory only. CO's are solely responsible for the final pricing decision.

#### When to Audit; Audit Procedures

CO's request the help of auditors when data on hand are not sufficient to establish prenegotiation objectives. The audit may be performed by the agency's own auditors or by arrangement with such activities as the Defense Contract Audit Agency. The CO reviews the audit report, resolves questions on the audit with auditors, and applies the auditor's findings in developing prenegotiation objectives. When requesting an audit, the CO should ask the audit office to determine whether audits completed during the preceding 12 months addressed certain cost elements, i.e. indirect costs. If so, the CO should not request a new audit of the proposed costs if the information from the prior audits is adequate for determining the reasonableness of such costs.

## Unit 40 Cost Analysis

FAR 15.404-1

- Define cost analysis.
- List typical elements of cost.
- Identify the primary goal of a cost analysis.

### Definition and Elements

Cost analysis is the review and evaluation of the separate cost elements and proposed profit that factor into the proposed price. Drawing in part on the technical evaluation of such matters as proposed quantities and on the audit report, the CO may establish prenegotiation objectives for the following elements of cost.

- Direct materials (quantity and price).
- Direct labor (quantity and rates).
- Indirect costs (e.g., Overhead and General and Administrative).
- Subcontracts.
- Other direct costs (e.g., Travel and Royalties).
- Profit or fee.

### Purpose and Application

The central issue, in cost analysis, is whether a proposed cost is realistic—assuming reasonable economy and efficiency—and otherwise allowable (see Chapter 8, Unit 71). The FAR, however, cautions against preoccupation with any one element of cost or believing that an agreement must be reached on every individual element. In negotiated procurements, the ultimate goal is an agreement on an overall price (or total estimated cost) and related terms and conditions (e.g., contract type and/or profit/fee) that, taken as a whole, is fair and reasonable to both parties.



## Unit 41 Evaluating Other Offered Terms and Conditions

- Identify terms and conditions other than technical and price that may be the subject of negotiations.

Offerors may present counterproposals on various terms and conditions of the RFP. For example, an offeror may propose that the Government:

- Use a different type of contract than solicited.
- Provide financing.
- Furnish property for the contract.
- Lease rather than purchase.
- Extend the proposed delivery schedule.

COs evaluate such counterproposals, both to establish the competitive range or otherwise select vendors for negotiations and prepare negotiation objectives and strategies.

## Unit 42 Award Without Discussions

FAR 15.306(a),  
52.212-1, and  
52.215-1

- Present reasons for awarding without discussions.
- Distinguish “clarification” from “discussion”.

When to Award  
Without Discus-  
sions

When using simplified acquisition procedures, there is no requirement to discuss quotations with submitting firms. When the solicitation includes either the provision at 52.212-1 (when acquiring commercial items) or 52.215-1 (for other items), the presumption is that award will be made without discussions. However, if the solicitation includes Alternate I to 52.215-1, you must hold discussions.

Regardless of the provisions in the solicitation, plan to hold discussions whenever discussions are necessary to obtain best value. For instance, generally plan to conduct discussions when:

- Cost or pricing data are required.

- Absent a requirement for cost or pricing data, you only have one offer or quotation and discussions are necessary to determine the reasonableness and realism of the proposed price.
- No proposal is technically acceptable.
- All prices appear to be unreasonably high or unrealistically low, compared with prior prices or current market prices for like deliverables.
- The lowest offered price appears to be unrealistic (e.g., the product of a potential cost estimating mistake) when compared with the Government estimate.
- The requirement — as interpreted by offerors — is not clearly understood.

### Clarification

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond), or to resolve minor or clerical errors. If adverse past performance information, to which an offeror has not had a prior opportunity to respond, is the determining factor preventing that offeror from receiving an award, allow the offeror to respond to the information.

## Unit 43 Communications/Factfinding

- Define “factfinding” and distinguish “factfinding” from “bargaining” and “negotiations”.
- State the purpose and limits on “communications” (i.e., factfinding) prior to establishment of a competitive range.
- Distinguish “clarification” from “discussion”.

### Definition

Factfinding is the process of identifying and obtaining information necessary to complete the evaluation of proposals. Factfinding can be performed using several methods (e.g., telephone calls, letters, conferences, and/or site visits). For example suppose an offeror states that its product will be “waterproof to a depth of 100 feet,” as required by the specification. In order to determine the validity or credibility of the offeror's proposal, the CO would ask for engineering data to show how the waterproofing will be accomplished.

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### Separating Fact-finding from the Discussions

Do not bargain or negotiate during a factfinding session. In fact, the CO should suspend factfinding if any member of the Government team begins to bargain or negotiate any term or condition of the solicitation or proposal/quotation — especially if the factfinding takes the form of communications prior to determination of the competitive range.

### Communications Prior to Determining the Competitive Range

Only “communicate” (i.e., conduct factfinding) with an offeror prior to determining the competitive range when the offeror’s proposal:

- Is neither clearly in or clearly outside the competitive range (see Unit 44) — hopefully a rare circumstance, OR
- Would be in the competitive range but for adverse past performance information to which the offeror has not had a previous opportunity to respond.

FAR 15.306(b)

During the communications, seek all information of potential value for enhancing understanding of the proposal; allow reasonable interpretation of the proposal; and otherwise facilitating the Government’s evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Ensure that the offeror understands that these communications do NOT represent an opportunity to revise its proposal.

During these communications, you may address:

- Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407)); and
- Information relating to relevant past performance. You must address adverse past performance information to which the offeror has not previously had an opportunity to comment.

### Factfinding Prior to Negotiations

FAR 15.406-1(a)

After determining the competitive range (or, when planning to hold discussions with one or more firms that submitted quotations in response to an RFQ), you may conduct factfinding sessions to obtain any and all information necessary to finalize prenegotiation objectives and prepare for negotiations. In competitive negotiations under FAR Part 15, you must hold discussions with all firms in the competitive range but are not obliged to conduct factfinding with all firms — restrict factfinding to those offers for which the factfinding is a necessary prerequisite to completing proposal evaluation as a basis for the negotiations. You can have as few as one factfinding session or any number of factfinding sessions between breaks in negotiation sessions. You can hold the factfinding sessions separate and apart from the negotiation sessions or as the front-end to con-

ducting negotiations on the same day. In short, you have complete, unrestricted flexibility in scheduling factfinding as a basis for conducting negotiations.

After conducting a factfinding session, the CO determines whether there is a need to:

- Obtain additional written information from the offeror.
- Revise prenegotiation objectives.
- Eliminate the proposal from the competitive range.

#### Unit 44 Extent of Discussions (Competitive Range)

- Discuss the selection of vendors for discussions when awarding through simplified acquisition procedures.
- Identify the reasons and criteria for of establishing a competitive range.

Selecting Vendors  
for Discussions of  
Quotations

FAR 13.106-2

Do not follow the rules in FAR Part 15 for determining a “competitive range” when using simplified acquisition procedures (SAP). If you plan on discussing quotations, ordinarily select no more than three vendors (see FAR 13.106-2(a)(4), which suggests that three are sufficient to meet the standard of “maximum practicable competition”) — and you may elect to negotiate (if negotiations are necessary) only with the vendor that submitted the most favorable quotation.

Determining the  
Competitive  
Range

FAR 15.306(c)

When using the procedures of FAR Part 15 for competitive discussions, the CO establishes a “competitive range” to determine which proposals warrant further consideration. The CO uses evaluation results (price and other factors) to establish the range. The CO conducts written or oral discussions with all offerors in the competitive range.

You must include ALL of the most highly rated proposals in the initial competitive range, unless you elect to further reduce the range for purposes of efficiency. You may consider limiting the competitive range for purposes of efficiency ONLY if the solicitation notified offerors of that possibility. If only a few proposals made the “most highly rated” category, include all in the competitive range. Otherwise, limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition.

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Among factors to consider in limiting the number of proposals:

- Expected dollar value of the award.
- Total number of offers in the “most highly rated” listing.
- Complexity of the acquisition and the variety and complexity of offered solutions, in terms of impact on the likely breadth and depth of the discussions.
- Resources available to conduct discussions vs. the expected variable administrative costs of discussions.
- Impact on lead-time for award vs. the need for timely delivery.
- The extent to which discussions with additional offerors would be subject to diminishing returns.

### Unit 45 Negotiation Strategy

- State several negotiation strategies and tactics.

When discussions are necessary, the CO prepares a negotiation plan that includes prenegotiation objectives and strategies for attaining them, based on information taken from sources such as the:

- RFP.
- Proposal.
- Factfinding results.
- Field pricing report, including any audit findings.
- Independent Government cost estimate.
- Technical evaluation.
- Acquisition histories and market research.

The plan will include negotiation tactics and strategies such as:

- Assigning roles to members of the Government’s negotiation team. For example, use engineering, accounting, and legal personnel to address critical issues involving their expertise.
- Opening negotiations with preplanned positions designed to achieve negotiation objectives.
- Using preplanned counter-offers to work toward your objectives.

- Offering concessions of lesser value in exchange for concessions that are of greater value to the Government.

The plan should also address the offeror's likely strategies and potential counters.

## Unit 46 Conducting Discussions/Negotiations

FAR 15.306(d),  
15.307, and  
15.405

- Briefly explain what takes place during a negotiation session.
- Identify the goal of noncompetitive negotiations.
- Identify the goal of competitive discussions and the process of conducting such discussions under FAR Part 15 and FAR Part 13.
- List examples of restrictions on negotiation sessions.
- List what goes into a price negotiation memorandum when a selection for award decision is made (negotiation).

### Negotiation Sessions

The CO develops an agenda for each negotiation. The agenda is designed to achieve the presolicitation objectives using the already planned negotiation strategies.

True negotiation includes bargaining. Both parties, the Government and the offeror, establish their objectives and enter into the negotiations with the expectation of bargaining to achieve those objectives.

Both negotiation teams have a leader, with the CO as the Government leader. Typically, the CO establishes the agenda because, as the buyer, the Government is raising questions about the seller's offer. The CO follows the agenda and uses the negotiation strategy. Caucuses may be used as necessary so that either party can privately discuss an issue needing resolution or a change in objectives.

### Non-Competitive Negotiations

In a non-competitive procurement, the CO negotiates with the contractor until a favorable agreement (best case) or an acceptable agreement (not necessarily favorable) is reached. However, the Government is not obliged to reach agreement if an acceptable agreement is not possible.

### Competitive Discussions Under FAR Part 15

In competitive procurements, you must hold an initial round of discussions with all offerors in the competitive range. During each such discussion, indicate and/or discuss significant weaknesses, deficiencies, and other aspects of the proposal (such as cost, price, technical approach, past per-

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formance, and terms and conditions) that could, in your opinion, be altered or explained to enhance materially the proposal's potential for award.

After the initial round of discussions, you may successively reduce the number of offerors with whom you continue to negotiate — whether or not all material aspects of an eliminated proposal have been discussed, or whether or not the offerors have been afforded an opportunity to submit a proposal revision. If you eliminate an offeror's proposal or otherwise remove it from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered

During the course of discussions, you may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of discussions, establish a common cut-off date and ask the remaining offerors to submit final proposal revisions. If the discussions have been successful, one or more of the offerors will submit a final proposal that meets the highest expectations of the Government (e.g., a superior technical proposal at a competitive price).

The nature of bargaining differs greatly between non-competitive and competitive negotiations. Instead of attempting to reach mutual agreement and finalize a deal, the CO's primary goal in competitive discussions is to *persuade* each offeror to submit a revised proposal that represents an improvement over the earlier proposal. The CO hopes any revisions will more likely satisfy the government's requirements and be closer in price to what the CO believes is fair and reasonable. However, offerors are free to remove themselves from consideration, make no changes at all in their proposals, or make changes that have no relationship whatsoever to the discussions.

### Restrictions on Discussions

There are several restrictions on conducting competitive discussions; some are listed in Exhibit 7-16.

### CAVEATS FOR COMPETITIVE DISCUSSIONS

#### DO NOT:

- Favor one offeror over another.
- Reveal an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror.
- Reveal an offeror's price without that offeror's permission. However, you may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. You also have discretion to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable .
- Reveal the names of individuals providing reference information about an offeror's past performance.
- Knowingly furnish source selection information in violation of 3.104 and 41 U.S.C. 423(h)(1)(2).

#### *Exhibit 7-16. Negotiation Caveats*

#### Competitive Discussions Under FAR Part 13

When holding discussions with multiple vendors in response to an RFQ, you need not follow the process for competitive discussions in FAR Part 15. For instance, you can negotiate an agreement with the vendor in line for award for incorporation in the purchase order to that vendor — without soliciting a final round of quotations from the other vendors with whom you have negotiated. However, observe the restrictions in Exhibit 7-16 regardless of the dollar amount of the award.

#### Documenting Discussions

The CO documents discussions in the contract file. Include such information as the purpose of the negotiations, identity of Government and contractor representatives, extent of reliance on certified cost and pricing data, basis for any waiver of cost and pricing data, summary of the contractor's proposal and the Government's prenegotiation positions, and the most significant facts or considerations in the establishment of prenegotiation positions on price and the negotiated price.



## 7.4 CONTRACT AWARD

Solicitation of Offers	Bid Evaluation	Proposal Evaluation	Contract Award
			47. Debriefing 48. Responsibility 49. Subcontracting Requirements 50. Prepare Awards 51. Issue Awards & Notices 52. Mistakes In Offers 53. Protests

*Exhibit 7-17. Steps In Awarding Contracts*

Award is the fourth and final function of Contract Formation. When studying contract award, you will recognize that some procedures vary depending on whether the contract results from simplified acquisition, sealed bidding, or negotiation procedures

### Unit 47 Debriefing

FAR 13.106-2(c)(3), 15.505, and 15.506	<ul style="list-style-type: none"> <li>• Define debriefing.</li> <li>• Describe debriefing requirements.</li> <li>• List debriefing “Do’s” and “Don’ts”.</li> </ul>
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#### Definition

Debriefing means informing unsuccessful offerors of the basis for the selection decision and contract award. Successful offerors may also request debriefings whenever award is on the basis of competitive proposals. The goal is to provide offerors with information that will help them submit better proposals in the future, through frank and open dialogue.

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When Required      Only debrief if a debriefing is requested.

When acquiring supplies or services under FAR Part 15, an offeror may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within 3 days after receipt of the notice of exclusion from the competition. In like manner, an offeror may request a post-award debriefing within 3 days after the date on which that offeror has received notification of contract award.

When competitively acquiring supplies or services under the simplified acquisition threshold, debrief only if you based award in part on factors other than price and only provide a brief explanation of the basis for the contract award decision.

Do's and Don'ts      Exhibit 7-18 lists the debriefing "Do's" and "Don'ts" .

<b>DEBRIEFING DO'S AND DON'TS</b>	
<p><b>DURING PRE-AWARD DEBRIEFINGS:</b></p> <ul style="list-style-type: none"> <li>• Disclose how the agency rated significant elements in that offeror's proposal.</li> <li>• Present a brief summary of reasons why the offeror was eliminated from the competition.</li> <li>• Answer the offeror's questions about the source selection process and agency rules on source selection.</li> </ul>	<p><b>DURING PRE-AWARD DEBRIEFINGS, DO NOT DISCLOSE:</b></p> <ul style="list-style-type: none"> <li>• The number of offerors.</li> <li>• The identity of other offerors.</li> <li>• The content of other offerors' proposals.</li> <li>• The ranking of other offerors.</li> <li>• The evaluation of other offerors.</li> <li>• Any of the information that may not be disclosed in post-award debriefings.</li> </ul>
<p><b>DURING POST-AWARD DEBRIEFINGS, YOU MAY:</b></p> <ul style="list-style-type: none"> <li>• Disclose the overall evaluated cost to the Government (including unit prices) and technical rating of the successful offeror and the debriefed offeror (including past performance information on the debriefed offeror), if applicable.</li> <li>• Disclose the overall ranking of all offerors when any ranking was developed by the agency during the source selection.</li> <li>• Present a summary of the rationale for award.</li> <li>• For commercial items delivered under the contract, disclose the make and model of the awardee's deliverable.</li> <li>• Provide reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.</li> </ul>	<p><b>DURING POST-AWARD DEBRIEFINGS:</b></p> <ol style="list-style-type: none"> <li>1. Do NOT provide point by point comparisons of the debriefed offeror's proposal with those of other offerors.</li> <li>2. DO NOT DISCLOSE: <ul style="list-style-type: none"> <li>• Trade secrets.</li> <li>• Privileged or confidential manufacturing processes and techniques.</li> <li>• Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information.</li> <li>• The names of individuals providing reference information about an offeror's past performance.</li> </ul> </li> </ol>

*Exhibit 7-18. Debriefings Do's and Don'ts*

## Unit 48 Responsibility

### FAR Subpart 9.1

- Define responsible offeror/quoter.
- List the general standards of contract responsibility.
- Describe the role of responsibility determinations in award decision making.
- Identify sources of information on the responsibility of prospective contractors.

A “responsible offeror” or quoter is business concern that satisfies all of the standards listed in Exhibit 7-19.

### RESPONSIBILITY STANDARDS

- Adequate financial resources (or the ability to obtain them).
- A satisfactory performance record.
- Ability to perform the work/services required by the contract within the required delivery schedule.
- A satisfactory record of integrity and business ethics.
- The necessary organization, experience, accounting and operational controls, and technical skills (or the ability to obtain them).
- The necessary production, construction, and technical equipment and facilities (or the ability to obtain them).
- Qualified and eligible to receive an award under applicable laws and regulations.
- Any special standards stated in the solicitation.

*Exhibit 7-19. Responsibility Standards*

## CONTRACT FORMATION PHASE

### Awarding Only to Responsible Business Concerns

Awarding solely on the basis of lowest evaluated price can be false economy if there is a substantial risk of subsequent default, late deliveries, or performance that is otherwise unsatisfactory. CO's are therefore not required to award to a supplier solely because that supplier has submitted the lowest price. Rather, CO's may award only to firms that have affirmatively demonstrated their responsibility and, when necessary, the responsibility of proposed subcontractors. (In practice, the CO's signature on a contract constitutes a determination that the prospective contractor is responsible with respect to that contract.)

For a small business concern, if the CO determines that it is not responsible, the matter is referred to the Small Business Administration for a final decision.

### Obtaining Information on Responsibility

The CO first checks the "List of Parties Excluded From Government Procurement Programs," to determine whether a contractor is debarred, suspended, or otherwise ineligible to receive a Government contract. If the concern has not been excluded, the CO next reviews data on the firm's responsibility from the offer, acquisition histories, and market research. If the CO, after such research, lacks the data to affirm the offeror's responsibility, the CO may ask the cognizant contract administration activity to perform a preaward survey of a prospective contractor's capability to perform the proposed contract. COs should not request preaward surveys if the contemplated contract involves the acquisition of commercial items, unless circumstances justify the cost.

Among other things, CO's must consider relevant past performance information collected by Government contracting activities during contract administration. However, a potential contractor can not be considered nonresponsible solely on the basis of a lack of relevant performance history, unless relevant experience was established in the solicitation as a "special standard of responsibility".

## Unit 49 Subcontracting Requirements

### FAR Subpart 19.7

- Identify the basic policy on providing subcontracting opportunities for HUBZone, small/disadvantaged, women-owned and other small business concerns.
- Describe requirements for subcontracting plans.

### Subcontracting Policy

A goal of the Federal acquisition process is to provide opportunities for HUBZone, small/disadvantaged, women-owned and other small business

concerns to obtain subcontracts.. Because prime contractors award substantial numbers of subcontracts, it is Government policy that prime contractors provide such subcontracting opportunities. This policy is put into effect by certain clauses that are included in government contracts and subcontracts.

### Subcontracting Plans

In some procurements, the apparently successful offeror is required to submit a subcontracting plan. The plan describes how the offeror will provide subcontract opportunities to HUBZone, small/disadvantaged, women-owned and other small business concerns. If awarded through the procedures of FAR Part 15, this plan is subject to negotiation if the CO concludes that the plan as submitted is not adequate. If awarded through sealed bidding, advise the bidder of deficiencies and invite it to submit a corrected plan by a specific date.

Subcontracting plans are required if the contract action is expected to exceed \$500,000 (\$1,000,000 for construction), and the contract is expected to result in subcontracting opportunities. Subcontracting plans are not required when:

- The prime contract is awarded to a small business concern or through the 8(a) program.
- The contract is for personal services.
- The contract is to be performed outside the US.

## Unit 50 Prepare Awards

- List considerations in recommending award when using simplified acquisition procedures, sealed bidding, and competitive negotiations.
- Describe the elements of a complete contract.
- Describe steps in preparing purchase orders.

### Recommending Part 13 and Part 14 Awards

When contracting by sealed bidding or when using simplified acquisition procedures, the CO selects or recommends a business concern for award based on the price and price-related factors stated in the IFB or RFQ. In selecting the awardee, the CO ensures:

- All requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

## CONTRACT FORMATION PHASE

- Multiple award and equal low bid procedures, if applicable, were handled correctly.
- Sufficient funds are available for obligation.

### Recommending Part 15 Awards

When contracting by negotiation, the CO selects, or recommends to the Source Selection Authority, an offeror for award. In selecting the awardee, the CO ensures:

- Evaluation factors (only those factors stated in the RFP) have been properly considered.
- Scores or ratings of the competing proposals have been arrived at according to the selection plan.
- The competitive range was fairly established.
- All requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.
- The offer selected for award represents the best value for the Government, in terms of the RFP's evaluation factors.
- Sufficient funds are available for obligation.

### Preparing Contracts

When awarding through sealed bidding or FAR Part 15 competitive negotiations, documentation should be sufficient to allow accurate reconstruction of the procurement for immediate review and for future reference. Drawing on that documentation, the CO prepares a contract for execution that establishes a legal and binding agreement (e.g., offer, acceptance, consideration, competent parties, lawful purpose, and certainty of terms). When soliciting sealed bids, incorporate the bid and all clauses from the IFB, including any amendments to the IFB, in the contract. In negotiated acquisitions, the contract must accurately convey that which was contemplated by the parties, as reflected in the RFP (including any amendments thereto) and the best and final offer.

### Preparing Purchase Orders

When awarding a Purchase Order against an RFQ, the CO:

- Ensures that all terms and conditions from the RFQ are incorporated
- Determines whether to require written acceptance of the order by the vendor prior to performance.
- Completes the order.
- Issues the order, either through the mails or electronically.
- Documents the award (keeping documentation to a minimum).

**Unit 51 Issue Awards and Notices**

- Describe the process for executing and issuing notices of award and contracts.

CO's execute contracts either by signing the contract itself or by issuing a Notice of Award. (Note that only a duly appointed CO, acting within the scope of his or her authority, may sign a contract). Award is usually made by (the CO) signing the award portion of the Standard Form 33, "Solicitation, Offer and Award" (when award is made through sealed bidding) or Optional Form 308, "Solicitation and Offer — Negotiated Acquisition".

If, however, an offer is changed so that it results in the need for a new, bilateral award document, the Optional Form 307, "Contract Award", is normally used, and both the offeror and the CO sign it. In some circumstances, such as contracting for construction, other forms may be required.

If the award is for commercial items, the CO signs the SF 1449.

The CO may also be required to notify:

- Unsuccessful offerors.
- SBA, the Department of Labor, and other such Government agencies.
- The public at large, through a CBD synopsis of the award and other announcements.
- The Federal Procurement Data System.

Copies of the signed contract are typically distributed to the contractor(s) within three days and also to the paying office, contract administration activities, audit services, and other such parties. CO's can use electronic rather than paper medium to transmit preaward, postaward and award notices.



## Unit 52 Mistakes in Offers

- Define mistake and describe the potential impact of mistakes.
- Identify potential preaward mistakes.
- Describe the basic procedure for resolving mistakes.
- Identify constraints on the CO's authority to resolve mistakes.

### The Nature and Harm of Mistakes

FAR 14.406 and  
15.508

Unfortunately, offerors often err in estimating costs and calculating a proposed price. In contracting by negotiation, mistakes in proposals that surface before award tend to have little impact because:

- Discussions are permitted (and especially desirable if you suspect a serious mistake in the proposal otherwise in line for award), and
- The offeror can correct mistakes or withdraw the proposal at any time before award.

Preaward mistakes in sealed bidding are of more concern because discussions are prohibited and a bid ordinarily cannot be changed or withdrawn after bid opening — it is firm until the time for acceptance has elapsed. Of equally grave concern are mistakes in either bids or proposals alleged after award.

On the one hand, the Government must avoid giving the bidder "two bites at the apple," to the detriment of the rights of other offerors and the integrity of the Federal acquisition process. On the other hand, ignoring genuine mistakes might :

- Force the awardee to work at a significant risk of losing money (with a correspondingly high risk of default or unacceptable performance), while
- Denying award to bidders who prepared (often at great expense) legitimate offers—which, in the long run, would tend to discourage them from pursuing Government contracts.

For these reasons, the FAR establishes procedures for (1) reviewing bids for mistakes and (2) resolving mistakes alleged by contractors.

### Identifying Potential Mistakes Prior to Award

When reviewing bids, look for:

- Apparent clerical mistakes, such as a missing decimal point.
- Potential non-clerical mistakes, such as a price that is so much lower than other offers or your own estimate, based on market research, as to indicate the possibility of error.

If you find potential mistakes, ask the bidder to verify the bid.

### Resolving Mistakes

Based either on a call from the CO to verify an offer or upon his/her own independent review of the offer, an offeror may allege a mistake.

If an offeror alleges a mistake prior to award in a negotiated acquisition, the “mistake” would become a matter for discussion and presumably would be rectified in the firm's final offer.

If a bidder alleges a mistake prior to award in sealed bidding, the bidder must request permission from the CO to correct or withdraw the bid. The CO in turn may reject the request and hold the bidder to the bid. The CO may do otherwise only when:

- The mistake is alleged in writing.
- Evidence of the mistake is clear and convincing.

If, regardless of the method of procurement, a contractor alleges a mistake in its offer after award, the contractor must request either that the contract be rescinded (i.e., terminated) or reformed (i.e., modified). The CO in turn may reject the request and hold the contractor to the awarded contract. The CO may do otherwise only when:

- The mistake is alleged in writing.
- Evidence of the mistake is clear and convincing.
- The mistake was so apparent as to have charged the CO with notice of the probability of a mistake.

Other than for preaward mistakes in negotiated acquisitions, the CO's options are constrained by such considerations as whether:

- The offeror's intended price can be calculated from available evidence.
- The intended price would have been lower than the next lowest offer in line for award.

Moreover, the CO may need to obtain approval for any proposed resolution of the mistake from a higher level (e.g., from the agency head or designee if the decision is to permit withdrawal of a bid after opening).

## Unit 53 Protests

### FAR Subpart 33.1

- Define the terms protest and interested parties.
- List the protest forums to which a protest may be submitted.
- Provide examples of the grounds for protesting award.
- Identify the impact of a protest on the acquisition.

#### Definitions

A protest is a written objection by an interested party to a: (1) solicitation for the acquisition of supplies or services (including cancellations of solicitations), or (2) proposed award or the award of such a contract. Interested parties also may protest cancellation or termination of award, if the protester alleges in writing that the termination or cancellation is based in whole or in part on improprieties concerning the award.

An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract, or the failure to award a contract.

#### Protest Forums

If the CO knows that an interested party intends to file a protest, the CO encourages the party to seek resolution within the agency (e.g., by using an "alternate dispute resolution" procedure). Otherwise, the interested party may pursue a protest with:

- The Comptroller General (GAO).
- SBA, for protests of an offeror's eligibility for set asides.
- U.S. Courts.

#### Reasons for Protests

There are numerous reasons why an interested party may file a protest. For example, the interested party may allege that:

- Specifications are unduly restrictive.
- A "late" bid or "nonresponsive" bid was accepted.
- It was improperly excluded from the competitive range.
- Award was improperly made.
- The awardee is not responsible.

## CHAPTER 7

### Impact on the Acquisition

Impact varies with the protest forum. For instance, pending the Comptroller General's review of a protest, COs generally:

- Delay award, when notice of the protest arrives prior to award.
- Suspend or terminate award, if the notice comes within 10 calendar days after award.

After reviewing the protest, the Comptroller General may recommend such actions as cancellation and resolicitation. The Comptroller General may also recommend award of protest costs, such as the costs of:

- Filing and pursuing the protest, and
- Bid or proposal preparation.